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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

TOMMY LaNIER, Plaintiff, v. CITY OF CHULA VISTA, a Municipality, KEAN McADAM, an individual; Defendants.	**Case No. 15-CV-0360 BAS (BLM)** **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO CITY OF CHULA VISTA'S MOTION FOR SUMMARY JUDGMENT, OR ALTERNATIVELY, PARTIAL SUMMARY JUDGMENT** **DATE: February 6, 2017** **CRTRM: 4B** **JUDGE: Hon. Cynthia Bashant** **(No Oral Argument Unless Requested by the Court)** **TRIAL DATE: August 22, 2017**

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I.

INTRODUCTION

Plaintiff Tommy LaNier ("LaNier") strongly opposes the motion for summary judgment ("MSJ") filed by defendant City of Chula Vista ("CCV") which seeks to extricate CCV from LaNier's claims against CCV for defamation, unlawful retaliation under California FEHA and unlawful retaliation under federal Title VII.

LaNier has brought separate claims for damages for violation of Title VII and FEHA against CCV based on LaNier being terminated in retaliation for complaining about sexual harassment and hostile work environment against a female employee (Valerie Taylor). The sexual harassment/hostile work environment was perpetrated by the Deputy Director of the HIDTA program, Ralph Partridge, and included incidents wherein Partridge bragged about the size of his penis (calling himself "donkey boy"); angrily called Val Taylor a "fucking cunt;" and, told Val Taylor that when his current wife died she would become his next wife and live in Colorado with him. On the defamation claim, LaNier alleges that CCV's supervisory employee, Kean McAdam ("McAdam"), impugned LaNier's honesty and credibility resulting in his abrupt termination after a stellar career.[1]

Earlier in this case, in response to motions to dismiss filed by CCV and defendant USA/HIDTA, the court rendered an extensive analysis of the nature of the HIDTA program, the manner in which it operates, and its status as an immune, non-suable defendant. The court's 2/16/2016 ruling dismissed USA/HIDTA out of the case as a defendant, but allowed the Title VII and FEHA retaliation claims to proceed against CCV. (See, Doc. No. 34.) In the course of this decision, the court made it crystal clear that LaNier's sole employer was CCV, not the HIDTA or the HIDTA Executive Board. (See, discussion, infra.)

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[1]LaNier and his counsel regret putting such offensive language before the Court and its staff, but given the gravity of this case, it was felt that, after much deliberation, the Court needed to be fully apprised of the seriousness of the hostile work environment, and the compelling reasons for LaNier to complain to his supervisors.

The present MSJ filed by CCV contends that plaintiff LaNier has no admissible evidence of defamation, that the defamatory statements were absolutely privileged, and that the defamatory statements were protected by a qualified privilege. Each of these contentions of McAdam will be shown to be without merit for compelling reasons.

On the DFEH and Title VII retaliation claims of LaNier, the centerpiece of CCV's argument is that LaNier was not an employee, and CCV was not his employer. As a result, CCV contends LaNier cannot have retaliation claims. This argument directly contravenes what the court has already ruled in this case in its Order Denying the CCV Rule 12(b)6 Motion to Dismiss in February, 2016. (Document No. 34.) This court ruled that LaNier's sole employer was CCV, not the HIDTA or the HIDTA Executive Board. CCV further argues that LaNier cannot establish a causal nexus between his complaining about sexual harassment and hostile work environment against Valerie Taylor and the adverse employment action (termination) against him. As will be shown, this is a disputed factual issue. LaNier has ample circumstantial evidence of a causal nexus which precludes summary judgment. This causational issue can only be decided by the jury.

II.

SUMMARY OF ARGUMENTS

In its Memorandum in Support of its MSJ, at page 1, lines 7-8, CCV states, "Plaintiff's Tommy LaNier's lawsuit against the City of Chula Vista brings to mind the proverb, 'no good deed goes unpunished.'" LaNier could not agree more. Here, LaNier complained to his supervisors about the sexual harassment/hostile work environment being endured by one of his female coworkers (the "good deed"), and the next thing he knows, his stellar career is over (the "undeserved punishment").

To ease an understanding of LaNier's arguments in opposition to the MSJ, the following summary is offered.

First, the Court has already disposed of one of CCV's main arguments, (*i.e.,* that it was not the employer of LaNier or McAdam), in its February 16, 2016 Order Granting the United States of America's Motion to Dismiss (Doc. No. 34). LaNier became concerned when CCV began to make claims that it was not LaNier's or McAdam's employer–the United States of America/HIDTA was. Consequently, to prevent the very situation which has now arisen, LaNier amended his complaint to add the United States of America/HIDTA as a defendant. Clearly one or the other was the employer. The Court already sorted out who the employer was in its February 16, 2016 Order when it ruled that CCV employed LaNier and McAdam. The Court then went on to dismiss the United States of America/HIDTA as a defendant. CCV's MSJ would have LaNier sit down between two chairs. Thankfully, the Court has already taken steps to prevent this.

Second, LaNier can establish a *prima facie* FEHA retaliation claim with admissible evidence showing that (1) he engaged in a protected activity (*i.e.,* complained about a hostile work environment), (2) CCV subjected him to an adverse employment action (*i.e*,. forced to resign or be fired), and (3) the protected activity and CCV's adverse action were causally connected (*i.e*,. the reason given for his termination was a pretext). LaNier has evidence to support all three elements.

Third, with respect to the defamation claim, (1) LaNier has admissible evidence that McAdam published defamatory statements about LaNier and such statements are not hearsay, (2) McAdam made the defamatory statements while acting in the course and scope his employment for his one and only employer, CCV; and (3) McAdam's statements were not privileged as he was not a "public official" within the meaning of the applicable statute, but even if he were, his statements would not be privileged since they were part of a purely operational function and not part of policy making.

Finally, exactly like his FEHA retaliation claim, without a doubt LaNier has a *prima facie* Title VII retaliation claim. All the arguments and all the evidence that supports LaNier's FEHA retaliation claim also support this Title VII claim. Further, LaNier has properly exhausted his administrative remedies when he filed his claim with the California Department of Fair Employment and Housing ("DFEH") and received a "Right to Sue Letter." Filing his claim with the DFEH is deemed under the law to have been "constructively filed" with the U.S. Equal Employment Opportunity Commission ("EEOC").

III.

BASIC RULES RELATING TO SUMMARY JUDGMENT

Summary judgment can only be granted if the court finds there is "no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." FRCP 56(a). Summary judgment is a drastic remedy and is therefore to be granted cautiously. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

The function of the courts on a motion for summary judgment is *issue finding, not issue resolution.* "[A] judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial . . . credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions . . ." Anderson v. Liberty Lobby, Inc., supra, 477 U.S. at 249-255. The court may decide the matter on summary judgment *only* if the underlying evidence is *undisputed*, and the record on the motion persuades the court that a trial would add nothing to the ability to decide the case – *e.g.*, there are no credibility issues. TransWorld Airlines, Inc. v. American Coupon Exchange, Inc., 913 F.2d 676, 684 (9th Cir. 1990). "Material" facts are those which, under applicable substantive law, may affect the outcome of the case. Anderson v. Liberty Lobby, Inc., supra, 477 U.S. at 248.

A factual dispute is "genuine" where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., supra, 477 U.S. at 248. The opposition evidence must be such that it could cause reasonable persons to disagree on whether the facts claimed by the moving party are true "enough to require a jury or judge to resolve the parties differing versions of the truth." Aydin Corp. v. Loral Corp., 718 F.2d 897, 902 (9th Cir. 1983). At the summary judgment stage, the nonmovant's version of any disputed issue of fact is presumed correct. McSherry v. City of Long Beach, 584 F.3d 1129, 1135 (9th Cir. 2009). Even entirely circumstantial evidence may be sufficient to create a triable issue of fact. Hopkins v. Andaya, 958 F.2d 881, 888 (9th Cir. 1992).[2]

Even where the basic facts are undisputed, if reasonable minds could differ on the inferences to be drawn from those facts, summary judgment must be denied. Lake Nacimiento Ranch Co. v. San Luis Obispo County, 841 F.2d 872, 875 (9th Cir. 1987). Summary judgment in tort cases is rare because the issues often require jury resolution of competing inferences. See, e.g., Goodman v. Staples The Office Super Store, LLC, 644 F.3d 813, 823-824 (9th Cir. 2011).

IV.

THE LaNIER FEHA RETALIATION CLAIM

CCV requests summary judgment on LaNier's second claim for relief in the FAC which is for unlawful retaliation under the California FEHA. LaNier alleges that his employment terminated because he complained about sexual harassment and hostile work environment directed against a female employee (Valerie Taylor) who worked in the HIDTA office with LaNier. As will be demonstrated, CCV cannot obtain summary judgment on the LaNier FEHA claim.

1. CCV Was LaNier's and McAdam's Employer as Already Ruled by This Court.

CCV's argument that it did not employ LaNier contravenes what the court has already ruled earlier in this case on February 16, 2016 in its Order Granting the United States of America's Motion to Dismiss (Doc. No. 34) Stated more colloquially, CCV is attempting to ride a horse which left the barn and ran out long ago.

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[2] Where words or conduct may be interpreted in several ways, one supporting summary judgment and one controverting it, summary judgment must be denied. (Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 521-522, 111 S. Ct. 2419, 2435 (1991).)

The attention of the court is once again respectfully invited to Document No. 34, filed 2/16/2016, at pp. 16, 17 and 18. This court stated:

> ... The court can reasonably infer from the Guidance (referring to the HIDTA Policy Guidelines) which Mr. LaNier and the City both submit for the court's consideration — that Mr. McAdam is the City's employee and not HIDTA's." (Doc. No. 34, p. 17, ll. 2-4.)
>
> ... Mr. McAdam, a HIDTA Director, is an employee of the City of Chula Vista, not HIDTA, the HIDTA program, or the HIDTA Executive Board. Necessarily, the court rejects the City's contention that it has no control of Mr. McAdam and that the Executive Board somehow possessed authority as an employer over Mr. McAdam." (Doc. No. 34, p. 18, ll. 2-6.)

And, with specific respect to the status of plaintiff LaNier, this court stated as follows in its 2/16/2016 ruling:

> The Court has already addressed above that similar allegations in the FAC coupled with the Guidance strongly suggests that HIDTA — the program itself and the Executive Board included — is not an employer. Rather, within the HIDTA program, grantees of HIDTA funding are the employers of any staff needed to carry out the objectives of HIDTA. That reasoning also applies here to Mr. LaNier. Consequently, the Court can reasonably infer that Mr. LaNier was indeed an employee of the City of Chula Vista at all relevant times to this action as he could not have been an employee of HIDTA." (Doc. No. 34, p. 19, ll. 1-8.) (Emphasis added.)

How much more plainly can the court state that CCV was the employer and HIDTA was not. Since LaNier and McAdam were employees of CCV, LaNier can sue CCV for unlawful retaliation under California FEHA; he is not barred because CCV was his employer.

At best, the issue of CCV's right to control LaNier's activities under the circumstances of this case presents a disputed material question of fact for trial. The court's attention is respectfully invited to the Declaration of Tommy LaNier filed concurrently herewith, in particular, paragraphs 14 *et seq.*, in which LaNier lists a number of facts pointing to him being an employee of CCV under the control of CCV. These facts are in addition to the undisputed fact that LaNier was a payroll employee of CCV from January 2004 until the time of his termination, and in spite of the fact that this court has already ruled that CCV was the sole employer of LaNier. Accordingly, the argument of CCV that LaNier is unable to prove that CCV was his employer is completely fallacious. This is a preposterous argument given the facts of the case and what this court has already ruled.[3]

2. HIDTA Was Not A "Special Employer."

CCV attempts an end run around the issue by attempting to characterize LaNier as a "special employee" of the HIDTA, arguing that CCV, as a "general employer," lent LaNier to the HIDTA who became the "special employer." (See, CCV Memorandum of Points and Authorities, p. 17, ll. 11-18.)

Once again, this court has already expressly rejected that argument in its Order Denying CCV's Motion to Dismiss LaNier's FAC filed 2/16/2016 [Doc. No. 34].) In connection with CCV's Motion to Dismiss, LaNier attempted to argue, as part of his effort to sue both CCV and the HIDTA, that McAdam was part of a joint employer relationship. This court rejected that argument, stating:

> Though Mr. LaNier persuasively argues that an individual such as Mr. McAdam may be part of a joint employer relationship, the record before the court strongly suggests that Mr. McAdam is solely an employee of the City of Chula Vista." (Emphasis added.) (Doc. No. 34, p. 16, ll. 24-27.)

In addition, CCV is incorrect in claiming that it is undisputed LaNier never contacted anyone at CCV about Partridge's behavior toward Valerie Taylor. LaNier orally complained to McAdam about the harassing behavior or Partridge, so this is a disputed material fact in this action. Furthermore, in frustration, LaNier contacted another executive working in the HIDTA office, John Redman (CEO of the other major fiduciary/grantee of the HIDTA program, CADFY), who arranged a meeting with

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[3] At its footnote 4, CCV cites the case of *Pendergast v. Leal,* 2001 WL 777032, 2001 U.S. LEXIS 10010 (E.D. La 2001) for the proposition that an officer getting paid by a city and assigned to a HIDTA was not a city employee. First, in the present case, the Court has already determined that LaNier is an employee of CCV. *See,* Section IV(1) *supra.* This alone bars any application of *Pendergast v. Leal.* Second, the *Pendergast v. Leal* case involved intentional torts which were found to be outside the scope and course of the police officer's duty and his conduct was not "employment-rooted." *Pendergast v. United States of America,* 1999 WL 983827,3, 1999 U.S. LEXIS 17070 (E.D. La 1999). Third, the *Pendergast v. Leal* court never analyzed the HIDTA Guidelines with its clear language that HIDTA is not an employer. *See,* Section IV(1) *supra.* Finally, the case is an Eastern District of Louisiana case with not controlling effect here. In fact, its history shows it has not been relied upon by any other court.

McAdam regarding the Partridge/Valerie Taylor situation. (See, deposition testimony of McAdam and Redman attached as excerpts to the Declaration of M. Richardson Lynn, Jr., and accompanying declaration of plaintiff Tommy LaNier at ¶ 10.)

V.

LaNIER HAS A *PRIMA FACIE* FEHA RETALIATION CLAIM

LaNier has no quarrel with the law cited by CCV that LaNier must show that (1) he engaged in a protected activity, (2) CCV subjected him to an adverse employment action, and (3) the protected activity and CCV's adverse action were causally connected. This standard is the same under both FEHA (Mammou v. Trendwest Resorts, Inc., 165 Cal.App.4th 686, 713 (2008)) and Title VII (Lawler v. Mount Blanc North America, LLC, 704 F.3d 1235, 143 (9th Cir. 2013).) LaNier has evidence to support all three elements.

1. LaNier Had a Reasonable Good Faith Belief When he Opposed the Behavior That Was Directed at Valerie Taylor.

CCV argues LaNier could not have reasonably believed that Partridge was engaged in unlawful activity because the activity amounted to "isolated incidents of sexual horseplay over several years..." (CCV Memorandum of Points & Authorities in Support of MSJ, p. 19, ll. 11-15.) CCV misapprehends the law on this point. The law is clear that opposition is protected as long as the employee had a reasonable and good faith belief that the employer's practice was unlawful. (Trent v. Valley Electrical Association, Inc., 41 F.3d 524,526 (9th Cir. 1994).) "It is good faith and reasonableness, not the fact of discrimination, that is the critical inquiry in a retaliation case. (Yanowitz v. L'Oreal USA, Inc., 36 Cal.4th 1028, 1043 (2005). Thus, a retaliation claim under FEHA may be brought by an employee who has opposed conduct that the employee reasonably believes to be unlawful and discriminatory, even if a court later determines the conduct was not actually prohibited by law. As long as the employee's mistake was reasonable, it is immaterial whether the mistake was one of fact or law. (Miller v. Department of Corrections, 36 Cal.4th 446, 475 (2005).) Accord: Moyo v. Gomez, 40

F.3d 982, 985 (9^{th} Cir. 1994) [in analyzing retaliation claims, courts should recognize that plaintiffs have limited legal knowledge]. An employee may "oppose" unlawful harassment or discrimination by simply reporting it to the employer. (Crawford v. Metropolitan Gov. of Nashville, etc., Tennessee, 555 U.S. 271, 277-278 (2009).)

Accordingly, under the FEHA, evidence of sexual harassment by a supervisor is probative as to whether plaintiff engaged in protected activity (*i.e.,* whether plaintiff reasonably believed the supervisor's conduct was discriminatory) and to whether the employer's subsequent adverse actions were motivated by plaintiff's complaints. (Lewis v. City of Benicia, 224 Cal.App.4th 1519, 1535-1536 (2014) [trial court erred in excluding all evidence of supervisor's sexually harassing conduct because such conduct was relevant to the retaliation claim, even if the evidence was not sufficient to actually support a harassment claim.].

The court is respectfully referred to the Declaration of Plaintiff Tommy LaNier at ¶ 10, and the accompanying Request for Judicial Notice submitted by plaintiff LaNier with regard to the FAC filed by Valerie Taylor against Ralph Partridge and her employer in the HIDTA office, CADFY. This complaint lists a number of incidents, which LaNier was aware of, and which gave him a reasonable good faith belief basis that Taylor was being unlawfully subjected to sexual harassment and hostile work environment.

2. CCV Was LaNier's Employer and Subjected Him to an Adverse Employment Action.

Once again, CCV continues to harp on the contention that the HIDTA Executive Board, not CCV, terminated LaNier, and that CCV's role in LaNier's employment was "purely ministerial." (See, CCV Memorandum of Points & Authorities in Support of MSJ, p. 19, ll. 22-27.) As has already been pointed out by plaintiff LaNier, this court has ruled in this case that CCV was the sole employer; LaNier was not employed by the HIDTA or the HIDTA Executive Board. (Doc. No. 34, Order Denying CCV's Motion to Dismiss filed 2/16/2016.) Therefore, LaNier's employer (CCV) subjected him to an adverse action by forcing LaNier to resign. This is an undisputed fact.

3. LaNier Has Substantial Evidence to Show a Causal Nexus Between Protected Activity and His Termination from CCV.

The issue of causation in a retaliation case is an inherently factual issue. CCV argues that LaNier has no evidence that any member of the HIDTA Executive Board knew about LaNier's reported complaints about Partridge. However, LaNier has evidence that the HIDTA Director, Kean McAdam, who was a supervisory employee of CCV, knew about LaNier's protected activity. It was McAdam who went to the 10/16/2013 HIDTA Executive Board "closed session" meeting which resulted in LaNier's termination. No member of the HIDTA Executive Board worked in the HIDTA office; McAdam did. So, whatever information the board obtained clearly came from McAdam.

Under FEHA, plaintiff is not required to prove "but for" causation to establish liability; plaintiff must only establish that the employer's action was "substantially motivated by discrimination" (commonly referred to as a mixed motive case). Alamo v. Practice Management Information Corporation, 219 Cal.App.4th 466, 477-478 (2013).) The court is entitled to examine a variety of factors on the causation issue, including whether the employer knew or should have known that the employee had engaged in a protected activity (Morgan v. Regents of University of California, 88 Cal.App.4th 52, 70 (2000)), proximity in time between the protected action and the allegedly retaliatory employment decision (Morgan v. Regents of University of California, supra, 88 Cal.App.4th at 69); and, whether the employer failed to take reasonable actions to end the retaliatory conduct. (Kelley v. Conco Cos., 196 Cal.App.4th 191, 213 (2011).)

Furthermore, if a subordinate, in response to a plaintiff's protected activity, sets in motion a proceeding by an independent decision-maker that leads to an adverse employment action, the subordinate's bias is imputed to the employer if the plaintiff can show that the allegedly independent adverse employment decision was not actually independent because the biased subordinate was involved in the decision or decision making process. (Poland v. Chertoff, 494 F.3d 1174, 1182 (9th Cir. 2007)); Accord: Reeves v. Safeway Stores, Inc., 121 Cal.App.4th 95, 114-115 (2004) [District manager relied on supervisor's report in firing an employee who claimed the supervisor was retaliating against him for reporting sexual harassment]. (This is sometimes referred to as the "cat's paw" theory of liability.)

In the present case, the evidence is that McAdam, a supervisory employee of CCV, was Director of the HIDTA who attended the crucial 10/16/2013 HIDTA Executive Board closed session meeting as a non-voting member, which resulted in the adverse employment action against LaNier. LaNier has been thus far cut off from finding out exactly what McAdam presented to the Executive Board in the way of information, except that a board member, Val Jimenez, has testified in deposition that McAdam informed the HIDTA Executive Board that LaNier took an unauthorized business trip to Puerto Rico, which is a falsity. McAdam has admitted that he was irritated by the situation in the work office involving Valerie Taylor and Ralph Partridge. There is evidence of an exemplary employee performance record on the part of LaNier for many years; LaNier's complaint about the treatment of Valerie Taylor by Partridge; the fact that the business trip to Puerto Rico was approved in writing by McAdam and was also approved orally by the higher-ups at ONDCP; the fact that ONDCP had requested that LaNier provide assistance and help to the Puerto Rico HIDTA; the fact that LaNier had taken dozens of business trips previously without ever needing to have the advance approval of ONDCP; the fact that one week after LaNier returned from the Puerto Rico trip, McAdam dispatched another person from the HIDTA office (John Redman) back to Puerto Rico without ONDCP approval; and, the fact that there was no independent investigation at all regarding the alleged unauthorized conduct of LaNier, and LaNier was never given an opportunity to respond.[4]

Plaintiff submits that it would be error to decide the disputed factual issue of nexus/causal effect by a summary judgment. There is ample circumstantial evidence from which a trier of fact could decide the issue of nexus/causal effect in favor of LaNier.

VI.

THE LaNIER DEFAMATION CLAIM

The LaNier FAC alleges a defamation claim against both defendant McAdam and defendant CCV. The LaNier FAC filed in this action (Doc. No. 9) alleges that CCV supervisory employee McAdam and CCV slandered and defamed LaNier by publishing to Executive Board members overseeing the San Diego HIDTA operation false, unprivileged and defamatory facts; namely, that LaNier falsified or lied about travel/travel expenses incurred with regard to a business trip to Puerto Rico which were understood by the listeners as accusing LaNier of dishonest and unprofessional conduct connected with his employment. (FAC, para. 24.) LaNier further alleges in the FAC that at the time the defamatory statements were made, defendants had no reasonable ground for believing the statements to be true. Specifically, there was no reasonable basis to dispute that the business trip to Puerto Rico had been properly approved and had been requested by higher authorities. (FAC, para. 26).

Defendant CCV asserts it is entitled to summary judgment on the defamation claim on three principal grounds; namely, (1) LaNier has no admissible evidence that McAdam published a defamatory statement about LaNier, (2) McAdam did not make the defamatory statements while acting in the course and scope of his employment by CCV; and (3) McAdam's statements regarding LaNier were privileged.

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[4]In the context of a wrongful discharge action, the California Supreme Court has held that an employer is obligated to conduct an adequate investigation regarding good cause for termination which includes notice of the claimed misconduct and a chance for the employee to respond. (Cotran v. Rollins Hudig Hall, etc., Inc., 17 Cal.4th 93, 107-108 (1998).)

1. Plaintiff Lanier's Defamation Claim Is Not Based on Inadmissible Speculation and/or Hearsay.

Contrary to the argument of CCV, LaNier has admissible evidence of defamatory statements made by McAdam about him to the HIDTA Executive Board members and HIDTA Fiscal Subcommittee members. This evidence is found in the depositions of HIDTA Executive Board member Val Jimenez and McAdam himself, as outlined below and as shown in the concurrently filed deposition excerpts attached to the declaration of M. Richardson Lynn, Jr., counsel for plaintiff LaNier. Plaintiff has this evidence even though the defense in this case has cut off any inquiry as to what statements McAdam made at the 10/16/2013 HIDTA Executive Board Closed Session meeting after which LaNier was terminated.[5]

First, it should be noted that any defamatory statements made by McAdam concerning LaNier are not inadmissible hearsay. Plaintiff is not offering the defamatory statements made by McAdam to prove the truth of the statements, only that the statements were made. Indeed, plaintiff is asserting and intends to prove that the defamatory statements which McAdam made concerning LaNier were not true. Further, any out of court statement by McAdam is an exception to the hearsay rule if it was made by the party (i.e., McAdam) in an individual or representative capacity. Rule 801(d)(2), Federal Rules of Evidence.

Next, turning to the specific deposition testimony of Val Jimenez and McAdam, Mr. Jimenez testified that he was appointed to the San Diego/Imperial HIDTA Executive Board for a period of approximately three years, which included the year

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[5] The instruction to McAdam not to answer about anything that happened at the HIDTA Executive Board Closed Session (other than producing voting ballots of HIDTA members relating to LaNier's termination) is the subject of a discovery motion which LaNier plans to file. Because of this unfortunate effort to close the door of proof on LaNier, LaNier is contending that under FRCP 56(d), the court should either deny the motion for summary judgment outright or defer considering the MSJ until plaintiff's discovery motion is ruled upon and plaintiff has an additional opportunity to obtain discovery about what exactly was stated/discussed at the 10/13/2016 HIDTA Executive Board Closed Session meeting.

2013. (Depo. of Val Jimenez, pp. 9,. 10, 11, 12.) Mr. Jimenez testified at several points regarding statements of McAdam to Executive Board members regarding a particular trip which Tommy LaNier took to Puerto Rico in September 2013.

Q: Do you recall at either this meeting on October 16, 2013 or some prior meeting any discussion about whether the trip was approved or not for Mr. LaNier to go to Puerto Rico?

* * *

A: Words to that effect, but I don't remember what he said verbatim —

Q: Did Mr. McAdam ever say that he had actually approved the expenditures for the trip? Do you recall him ever saying that?

A: Yes, I believe it was, yes.

Q: So did Mr. McAdam say what it was that was not approved or that it was somehow improperly done?

* * *

A: I mean, if you could rephrase it a little better —

Q: Well, if there's something that – if Mr. McAdam had approved the expenditures for the trip, do you recall Mr. McAdam saying anything to the effect that it still had not been properly approved in some manner?

A: The expenditures were signed off by Mr. McAdam, but that when he went back and looked into it, that it had – at his – Tommy's direct supervisor did not have knowledge of it. . . .

Q: Do you recall Mr. McAdam stating at any time at the closed session meeting or before, that Mr. LaNier had somehow 'lied' in connection with the Puerto Rico trip or the approval for the trip.

A: I never heard him use those words.

Q: Do you recall the words that he did use? Just 'not approved?'

A: Yeah, it was not the – that the trip was not – that when he had spoken to his – to Tommy's supervisor, that the supervisor said that he did not know about the trip or did not know about or approve the trip. Something to that effect.

(Deposition of Val Jimenez, p. 33, ll. 2-25, p. 34, ll. 1-16, p. 35, ll. 6-22.)

Mr. Jimenez further testified as follows:

Q: Okay, did Mr. McAdam in the Executive Board meeting ever say that he had talked to anyone in ONDCP as it relates to approval for Mr. LaNier's Puerto Rico trip?

A: He said he had spoken to someone and the way I recall, he had spoken to Tommy's supervisor and that the supervisor did not have any knowledge of his trip or the approval for that trip. That's what he said.

Q: And the supervisor that you were referring to was someone in ONDCP in the White House?

A: That was my understanding."

(Deposition of Val Jimenez, p. 76, ll. 2-11.)

The testimony of Val Jimenez was confirmed by McAdam himself in his deposition, even though his counsel precluded inquiry into what McAdam stated and what information he provided at the 10/16/2013 Executive Board Closed Session of the HIDTA. McAdam is the Director of the San Diego/Imperial HIDTA, but a payroll employee of the City of Chula Vista (McAdam Deposition, pp. 6, 11, 12). McAdam testified that he had made statements about LaNier's conduct to HIDTA board members before the October 16 closed session meeting.

Q: Was any information provided by you before the closed session about the scenario with the travel trip to Puerto Rico in early September 2013?

Mr. Vendler: To board members; is that what you are asking?

Mr. Lynn: To board members or to – you mentioned the fiscal subcommittee. That's not the board, that's something else. I will come back to that in a moment. But did you provide before the executive closed session, which the door has been shut on that, what happened? But did you provide information to board members before the executive closed session about Mr. LaNier in regard to the travel trip to Puerto Rico in early September 2013?

A: Yes.

Q: Okay, what did you say?

A: I discussed that Tommy LaNier had told me that Mike Gottlieb of ONDCP asked him to go. I subsequently found out that wasn't the case. Found that out from Mike Gottlieb. Therefore, I had concerns that Mr. LaNier was untruthful in justifying the trip.

Q: Did you talk to Mr. Gottlieb?

A: Yes.

Q: And he said that he had not authorized Tommy to go?

A: No, that's not what he said.

Q: What did he say?

A: He said he did not request or direct him to go." (Emphasis added.)

(Deposition of Kean McAdam, p. 51, ll. 11-25, p. 52, ll. 1-25, p. 53, ll. 1-14.[6])

The above deposition testimony of McAdam stating that Michael Gottlieb of ONDCP did not request or direct LaNier to go on the trip to Puerto Rico (which assertion McAdam makes in his Declaration in Support of the MSJ at paragraphs 18-20) is directly contradicted by other McAdam deposition testimony and the deposition testimony of another percipient witness, Scott Hinson. In his deposition McAdam testified as follows:

By Mr. Lynn:

Q: Did you have a discussion with anybody at ONDCP, anybody, between the time you signed Exhibit 5 and the time the trip was actually taken, which was September 3, 2013?

Mr. Vendler: About the trip?

Mr. Lynn: Yes, about the trip.

A: Not specifically about the trip, no. But, yes, had a conversation with Mike Gottlieb and Shannon Kelly on the speaker phone at Washington, and Tommy LaNier and I in my office.

Q: And this is before the trip commenced?

A: Before the trip.

Q: And what was discussed in that conversation?

A: About the formation of an advisory board for the National Marijuana Initiative.

Q: Okay. Was there any discussion in that conversation about the taking of this trip to Puerto Rico specifically?

A: At the very end of the call, yes, I mentioned that Tommy was going to Puerto Rico at their suggestion or request, and you're happy about that or words to that effect.

Q: And what was said by —

A: Absolutely nothing; I noted that. There was no response from either Mike Gottlieb or Shannon Kelly, confirmation, denial, nothing.

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[6]The deposition excerpts quoted herein are attached to the accompanying Declaration of M. Richardson Lynn, Jr. in Opposition to the MSJ.

Q: But the trip was specifically discussed in this phone conversation?
A: I specifically brought it up. One sentence and the response was null, nothing."

(Deposition of McAdam, p. 57, ll. 21-25, p. 58, ll. 1-25, p. 59, l. 1.)

McAdam's testimony about the request, direction and authorization by ONDCP for the LaNier Puerto Rico (which McAdam contends was never requested, directed or authorized) is further contradicted by the deposition testimony of Scott Hinson in literally three places in his deposition. In 2013, Hinson was the Chief of Criminal Investigations for the National Park Service who went on the HIDTA business trip to San Juan, Puerto Rico in September 2013 with Tommy LaNier and third persons. Hinson testified that in a lunch meeting which occurred in Redding, California a matter of days before the trip to Puerto Rico, he was present with LaNier, Shannon Kelly of ONDCP and Michael Botticelli of ONDCP. Kelly and Botticelli stated they were aware of the upcoming trip to Puerto Rico, approved of the trip, and were really glad that Tommy LaNier and his team were traveling to the Puerto Rico HIDTA because they needed the help. (See, excerpts of deposition testimony of Scott Hinson at pp. 11, 12, 13, 23, 24, 25, 26, 57, 58 and 64 attached to the accompanying Declaration of M. Richardson Lynn, Jr.

The bottom line is that LaNier has evidence of McAdam falsely stating to HIDTA Executive Board members that LaNier was not requested or directed by ONDCP to go on the trip to Puerto Rico. (This was McAdam's pretext to get LaNier fired because of LaNier's complaining about sexual workplace harassment of a female employee, Val Taylor, by McAdam's buddy, Ralph Partridge.)

It is clear that the argument that LaNier's defamation claim is based purely on inadmissible speculation because he was not personally present to hear the defamatory statements is not a valid argument. There is admissible testimony in the record of both McAdam himself and a HIDTA board member who heard the defamatory statements (Val Jimenez) which supports the claim of published defamatory statements by McAdam concerning LaNier. LaNier was in a position of significant responsibility being in charge of the National Marijuana Initiative. There can be no question that these statements made by McAdam defamed LaNier. The statements had a tendency to disparage qualities (credibility, honesty) that were peculiarly required for LaNier's business, trade and/or profession and thus constituted slander per se within the meaning of Cal.Civ.Code §46. (See, Smith v. Maldonado, 72 Cal.App.4th 637 (1999).) The statements made were clearly statements of fact, not statements of opinion, because they implied knowledge of facts which led to false conclusions which are susceptible to being proved objectively true or false. (Gill v. Hughes, 227 Cal.App.3d 1299, 1309 (1991)); Terry v. Davis Community Church, 131 Cal.App.4th 1534, 1552 (2005).)

2. The Court Has Already Ruled in This Case That the Conduct of McAdam was Done as an Employee of CCV.

CCV argues that LaNier's defamation claim against it must fail because LaNier cannot establish that McAdam made any defamatory statement in his capacity as a CCV employee. (See, CCV Memorandum of Points &Authorities in Support of MSJ, p. 12, ll. 18-20 [Doc. 53-1 filed 1/6/2017].) This argument flies in the face of what this court already ruled in its Order Denying CCV's Motion to Dismiss filed 2/16/2016 [Doc. No. 34]. It is as if CCV wants to ignore that this court has already ruled that McAdam is solely an employee of the City of Chula Vista. (Doc. No. 34, p. 16, ll. 26-27, p. 17, ll. 1-4 and 18-21.) The following are key excerpts from this court's ruling on 2/16/2016 in its Order Denying CCV's Motion to Dismiss:

> Though Mr. LaNier persuasively argues that an individual such as Mr. McAdam may be part of a joint employer relationship, the record before the court strongly suggests that Mr. McAdam is solely an employee of the City of Chula Vista." (Doc. No. 34, p. 16, ll. 24-27.) (Emphasis added.)
>
> The starting point in this determination is the fact that the City of Chula Vista is a HIDTA grantee. From there, the court can reasonably infer from the Guidance — which Mr. LaNier and the City both submit for the court's consideration — that Mr. McAdam is the City's employee and not HIDTA's." (Emphasis added.) (Doc. No. 34, p. 17, ll. 1-4.)
>
> ... Dispelling the notion that a HIDTA Director may have special employee status, the Guidance expressly states that the individual selected to be a HIDTA Director 'will be an employee or contractor of a grantee and

will be subject to all employment, contracting and other conditions established by that grantee.' ..." (Doc. No. 34, p. 17, ll. 17-21.)

... Mr. McAdam, a HIDTA Director, is an employee of the City of Chula Vista and not HIDTA, the HIDTA program, or the HIDTA Executive Board. Necessarily, the court rejects the City's contention that it had no control of Mr. McAdam and that the Executive Board somehow possessed authority as an employer over Mr. McAdam." (Doc. No. 34, p. 18, ll. 2-6.) (Emphasis added.)

Accordingly, CCV's argument to escape from defamation liability because McAdam's conduct was not as an employee or within the scope of his employment by CCV is nonsense. Everything McAdam did was as an employee of CCV as his sole employer; there was no other employer for McAdam. The fact that CCV was a grantee under the HIDTA program and that federal money flowed through CCV does not mean that the true employer of McAdam was the HIDTA or the HIDTA Executive Board. This court has ruled otherwise in this case.

Indeed, if the CCV argument is accepted by this court, and given the fact that this court has previously ruled LaNier cannot sue USA, the HIDTA or the HIDTA Executive Board for anything that happened to LaNier, we would then have a situation which would violate one of the most fundamental maxims of jurisprudence, namely: "For every wrong there is a remedy." (Cal.Civ.Code §3523.) The fact that LaNier has a claim against McAdam individually and McAdam has insurance is not a legal defense for CCV. The general rule in California is that anyone who takes a responsible part in the publication of a defamatory statement is liable for the defamation. (Osmond v. EWAP, Inc., 153 Cal.App.3d 842, 852 (1984) Accord: Sheppard v. Freeman, 67 Cal.App.4th 339, 349 (1998).) In the Sheppard case, supra, the court ruled that a defamation claim by an airline pilot who was fired from his job and slandered by one or more coworkers in the context of his firing could sue both the employer and the individuals who committed the defamation.

3. The Defamatory Statements Were Not Privileged.

CCV adopts the same privilege arguments made by defendant McAdam in his MSJ on the LaNier defamation claim; namely, the defamatory statements of McAdam were absolutely privileged under Cal. Civ. Code §47(a) or are protected by the "common interest" qualified privilege set forth in Cal. Civ. Code §47(c). In his opposition to the MSJ filed by defendant McAdam, plaintiff LaNier extensively discussed why neither of these privileges can be summarily adjudicated against LaNier. This discussion is contained in Document No. 43, filed 11/28/2016, pp. 14-22. There is no need to repeat that extensive discussion here; LaNier incorporates and adopts that discussion as part of his opposition to the CCV Motion for Summary Judgment on the defamation claim.

In a nutshell, the absolute privilege of Cal. Civ. Code §47(a) does not apply because McAdam is not a "public official" within the meaning of the statute, but even if he is deemed to be so, his statements were part of a purely operational function, not a policy making or planning function. The absolute privilege can only apply where a public official is exercising a planning or policy making function as distinct from an operational function. There can be no question that the internal personnel issue involving LaNier was purely an operational function. (See, McQuirk v. Louis Kevin Donnelley, 189 F.3d 793 800 (9th Cir. 1999).)

As for the qualified "common interest" privilege of Cal. Civ. Code §47©, this privilege is defeated if it is shown that McAdam lacked a reasonable ground for belief in the truth of the defamatory statements which presents a disputed question of fact which can only be determined by the trier of fact at trial. Plaintiff LaNier has catalogued a number of facts in his opposition to the McAdam MSJ which demonstrate McAdam did not have a reasonable ground to believe the truth of his defamatory statements regarding LaNier. This is a factual issue for trial.

4. If the Court Considers Granting the Motion Regarding the Defamation Claim, It Should Apply Federal Rule of Civil Procedure 56(d) to Allow Plaintiff to Obtain Necessary Facts Regarding the Defamation Claim.

"Summary judgment is premature unless all parties have 'had a full opportunity to conduct discovery.'" *Convertino v. DOJ,* 684 F.3d 93, 99 (D.C. Cir. 2012) (quoting

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986)). Due process requires courts to "afford the parties a full opportunity to present their respective cases" before reaching a ruling on the merits. *University of Texas v. Camenisch,* 451 U.S. 390, 395 (1981). Federal Rule of Civil Procedure 56 (d) prevents a nonmoving party from being "railroaded" into summary judgment by a "premature motion." *Celotex Corp. v. Catrett,* 477 U.S. 317, 326 (1986).[7] LaNier believes the Court should deny the motion outright. If, however, the Court is open to granting the motion regarding the defamation claim based upon the record as it currently exists, then the Court should first afford LaNier the opportunity to finalize discovery by utilizing Federal Rule of Civil Procedure 56 (d). In fact, when the facts are in the possession of the moving party (as here), a continuance of the motion for summary judgment for purposes of discovery should be granted almost as a matter of course. *Costlow v. United States,* 552 F.2d 560, 563, 564 (3rd Cir. 1977); *see also, Ward v. United States,* 471 F.2d 667, 670-671 (3rd Cir. 1972). The Ninth Circuit has held that "a denial of a Rule 56(d) request is disfavored where the party opposing the summary judgment motion makes a timely request which identifies relevant information, and where there is some basis for believing that the information sought actually exists." *Church of Scientology v. I.R.S.,* 991 F.2d 560 (9th Cir. 1993).

Rule 56 (d) provides as follows:

> *(d) When Facts Are Unavailable to the Nonmovant.* If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;
>
> (2) allow time to obtain affidavits or declarations or to take discovery; or
>
> (3) issue any other appropriate order.

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[7]That case, as does other cases cited herein, applied the former Rule 56(f) which was identical in substance to the current Rule 56(d).

When faced with a premature motion, the nonmoving party may file a declaration under Rule 56(d) outlining the particular facts the nonmoving party intends to discover and describe why those facts are necessary to the litigation. *Convertino v. DOJ, supra,* 684 F.3d at 99. Once a proper Rule 56 declaration is filed, the District Court must then (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order. Here, LaNier has filed the Rule 56 declaration in the form of the Declaration of M. Richardson Lynn, Jr. as required.

The HIDTA Executive Board conducted a so-called "Executive Session" (also referred to as a *closed session*) on October 16, 2013, at which time Lanier was discussed with McAdam participating in the discussion. CCV has taken the position that this discussion is subject to the "Official Information" privilege pursuant to California Evidence Code section 1040(a) and he need not disclose the content of the discussion. This is the same position taken during discovery. (See, Declaration of M. Richardson Lynn, Jr., at ¶ 6.) Consequently, both CCV and McAdam are keeping the full story from both the Court and from LaNier.

It is LaNier's position that the assertion of California Evidence Code section 1040(a) is improper and the Court needs to be fully advised as to the content of the Executive Session discussion. In furtherance of this, LaNier plans to file a Motion to Compel Discovery Response to compel further deposition testimony. Pending this discovery, should the Court find merit with CCV's Motion regarding the defamation claim, it is requested that the Court first allow LaNier the opportunity to be heard on his discovery motion and, if granted, after further deposition testimony from McAdam. In this way, the Court and LaNier will be fully informed as to the statements made by McAdam. Determining what was said during the Executive Session is an important step in affording the parties a full opportunity to present their respective cases before reaching a ruling on the merits. *University of Texas v. Camenisch,* 451 U.S. 390, 395 (1981).

VII.

LaNIER TITLE VII RETALIATION CLAIM

In seeking summary judgment on LaNier's Third Claim for Relief for unlawful retaliation under Title VII, CCV argues three things, to wit: (1) LaNier did not exhaust his administrative remedies; (2) CCV was not the employer of LaNier; and, (3) LaNier cannot make out a *prima facie* Title VII retaliation claim. Each of these contentions of CCV are without merit.

1. LaNier Filed a DFEH Claim and Obtained a Right to Sue Letter Which is Sufficient to Constitute a Claim and Right to Sue From EEOC.

The attention of the court is respectfully invited to the accompanying Declaration of M. Richardson Lynn, Jr., relating to LaNier's filing of a claim with DFEH on 6/23/2014. (See, Exhibit A to accompanying Declaration of M. Richardson Lynn, Jr.)

Where federal and state law overlap (as in the case of retaliation claims under Title VII and California DFEH), employment discrimination charges may be filed with either the EEOC or the DFEH. State agencies are authorized to investigate and enforce Title VII claims pursuant to "work sharing agreements" with the EEOC. (42 U.S.C. §2000e-8(b); 29 CFR §1626.10(c).) As a result of such work sharing agreements, each agency designates the other as its agent for the purpose of receiving charges on discrimination claims that overlap under federal and state law. Thus, charges filed with either the EEOC or the DFEH are deemed "constructively filed" with the other. (Laquaglia v. Rio Hotel & Casino, Inc., 186 F.3d 1172, 1175-1176 (9th Cir. 1999).)

Accordingly, because of the "work sharing agreement" between DFEH and EEOC, an employee is entitled to a federal right to sue letter after filing a timely charge with DFEH. (Stiefel v. Bechtel Corp., 624 F.3d 1240, 1244-1245 (9th Cir. 2010).)

The Rutter Group Practice Guide, Employment Litigation states the following as a practice pointer for plaintiffs' counsel in employment law litigation:

> It is generally not necessary for California employees to file charges with the EEOC. Timely filing with the California DFEH satisfies administrative exhaustion requirements under both Title VII and the

FEHA." (The Rutter Group, California Practice Guide, Employment Litigation, §16.25.6.)

Therefore, the fact that plaintiff did not file a claim with EEOC before filing suit in this case for unlawful retaliation does not bar his Title VII claim since plaintiff undisputedly filed a claim with California DFEH and obtained a Right to Sue Letter. Plaintiff LaNier is deemed to have constructively filed a claim with the EEOC and to have received a Right to Sue Letter from the EEOC.

2. CCV Did Employ LaNier.

Contrary to the contention of CCV, this court has previously ruled in this case that CCV was the sole employer in the HIDTA office. CCV seems unwilling to accept the court's ruling on this point. CCV's continuing argument that it served as a mere "pass through" for federal grant money needed to fund LaNier's position with HIDTA does not equate to LaNier not being an employee of CCV. (The court is respectfully referred to the earlier extensive discussions of this point in this Memorandum of Points &Authorities, supra.)

Furthermore, as also pointed out supra, there are numerous indices of LaNier being an employee of CCV beyond the undisputed fact that he was a nine-year payroll employee of CCV before he was terminated/forced to resign. (See, accompanying Declaration of Tommy LaNier in Opposition to CCV's MSJ at ¶¶ 2 and 14.) At a minimum, a factual issue regarding the right to control LaNier is created by the facts establishing indices of CCV employee status on the part of LaNier.

3. Since LaNier Has Sufficient Facts to Make Out a *Prima Facie* FEHA Retaliation Claim, He Likewise Has a *Prima Facie* Title VII Retaliation Claim for the Same Reasons.

In LaNier's discussion of his California FEHA retaliation claim, supra, numerous facts are presented establishing a causal nexus between LaNier's engaging in a protected activity and the adverse employment action against him. Because the law under DFEH and Title VII on retaliation claims are closely parallel, no further discussion is needed on this point. If LaNier has sufficient facts to make out a *prima facie* case for retaliation under DFEH, he likewise has sufficient facts to make out a *prima facie* case for Title VII retaliation. Plaintiff LaNier strongly contends that no summary judgment can be made because numerous facts constituting circumstantial evidence create factual inferences of retaliation and a causal nexus which can only be decided by a trier of fact/jury.

VIII.

CONCLUSION

For the reasons set forth above, and based further on all the papers and evidence submitted by plaintiff LaNier in opposition to the CCV Motion for Summary Judgment, the motion for summary judgment should be denied in its entirety. CCV is not entitled to summary judgment on any of the three claims of LaNier against CCV, namely, defamation, retaliation under California DFEH, and retaliation under Title VII. This case should be allowed to proceed to a jury trial on the merits.

Respectfully submitted,

M. RICHARDSON LYNN, JR., APC

Dated: January 23, 2017

By: */s/ M. Richardson Lynn, Jr.*
M. Richardson Lynn, Jr., Attorney for Plaintiff, Tommy LaNier